

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

GUISEPPE AMOROSO : CIVIL ACTION
 :
 v. :
 :
 STEVEN A. MORLEY, ESQUIRE : 00-3496

M E M O R A N D U M

WALDMAN, J.

March 25, 2002

I. Introduction

Plaintiff has asserted a legal malpractice claim against defendant, his former attorney in deportation proceedings. Plaintiff complains that defendant failed to give adequate attention to plaintiff's case and specifically delayed in filing a motion for a bond redetermination during the pendency of plaintiff's appeal from a deportation order which necessarily resulted in a prolonged period of incarceration. Plaintiff seeks damages for lost earnings from his inability to carry on his business during his 92 days of detention by the Immigration and Naturalization Service ("INS"), diminished future earnings capacity, mental anguish and pain and suffering.

Plaintiff is a citizen of Italy. Defendant is a citizen of Pennsylvania. The court has subject matter jurisdiction pursuant to 28 U.S.C. § 1332(a)(2). Presently before the court is defendant's motion for summary judgment.

II. Legal Standard

In considering a motion for summary judgment, the court must determine whether "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247 (1986); Arnold Pontiac-GMC, Inc. v. General Motors Corp., 786 F.2d 564, 568 (3d Cir. 1986). Only facts that may affect the outcome of a case are "material." Anderson, 477 U.S. 248. All reasonable inferences from the record are drawn in favor of the non-movant. See id. at 256.

Although the movant has the initial burden of demonstrating the absence of genuine issues of material fact, the non-movant must then establish the existence of each element on which it bears the burden of proof. See J.F. Feeser, Inc. v. Serv-A-Portion, Inc., 909 F.2d 1524, 1531 (3d Cir. 1990) (citing Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986)), cert. denied, 499 U.S. 921 (1991). A plaintiff cannot avert summary judgment with speculation or by resting on the allegations in his pleadings, but rather must present competent evidence from which a jury could reasonably find in his favor. Anderson, 477 U.S. at 248; Ridgewood Bd. Of Educ. v. N.E. for M.E., 172 F.3d 238, 252 (3d Cir. 1999); Williams v. Borough of West Chester, 891 F.2d

458, 460 (3d Cir. 1989); Woods v. Bentsen, 889 F. Supp. 179, 184 (E.D. Pa. 1995).

III. Facts

From the competent evidence of record, as uncontroverted or otherwise taken in the light most favorable to plaintiff, the pertinent facts are as follow.

Plaintiff pled guilty on May 30, 1996 to two counts of cocaine distribution. He was released on \$25,000 recognizance bond pending his sentencing hearing. On August 23, 1996, plaintiff was sentenced in this court by the Hon. Charles R. Weiner to five months of incarceration followed by three years of supervised release. Plaintiff was then a lawful permanent resident of the United States.¹

On January 15, 1997, the INS initiated deportation proceedings against plaintiff as an alien convicted under a law relating to a controlled substance, pursuant to violation of Section 241(a)(2)(B)(i) of the Immigration and Nationality Act

¹ Plaintiff was born in Italy in 1964 and entered the United States through New York City in 1969. "The term 'lawfully admitted for permanent residence' means the status of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws, such status not having changed." 8 U.S.C. § 1101(a)(20)(2001).

("INA"), and as an alien convicted of an aggravated felony, pursuant to Section 241(a)(2)(B)(iii).²

The INS issued a warrant for plaintiff which was served on February 27, 1997 on the detention enforcement officer at F.C.I. Fairton where plaintiff was serving his sentence for the drug offense. Plaintiff was released from prison in April 1997 but was subsequently detained and held in INS custody. On May 2, 1997, an immigration judge in Oakdale, Louisiana released plaintiff from INS custody on \$7,000 bond and granted plaintiff's motion to transfer venue to Philadelphia.

Plaintiff met with and retained Mr. Morley on September 2, 1997. Although no retainer agreement was entered into, defendant appeared in immigration court on plaintiff's behalf for a master calendar hearing on November 4, 1997 and represented plaintiff at his deportation hearing on February 2, 1998. At the conclusion of the hearing, it was ordered that plaintiff be deported. Just after the hearing, the parties signed a fee agreement by which defendant agreed to represent plaintiff in an appeal to the Board of Immigration Appeals ("BIA").³ Defendant timely filed a notice of appeal with the BIA.

² At present, the relevant section, entitled "Deportable aliens," is Section 237. See 8 U.S.C. § 1227 (2001).

³ Included in the agreement was a promise by plaintiff to compensate defendant for services performed in connection with the deportation hearing.

Shortly after the deportation hearing, plaintiff's supervised release was revoked and he was committed to custody at F.C.I. Fort Dix for smoking marijuana.⁴ Plaintiff's sister informed Mr. Morley that plaintiff had been re-incarcerated. While he was incarcerated, the INS placed a detainer on plaintiff. On March 2, 1998, Mr. Morley sent a letter to Charles Zemski, Assistant District Director of Investigations of INS in Philadelphia, stating that he expected Mr. Amoroso to come into INS custody on March 28, 1998 and requesting that his original bond status be reinstated while the deportation order was on appeal to the BIA.

Plaintiff was taken into INS custody in Newark on March 27, 1998. Plaintiff's sister learned of this in a telephone conversation with Linda Merchison at the INS Detention and Deportation Section in Newark. Plaintiff's sister advised defendant of this on April 1, 1998 and he promised to contact Ms. Merchison to seek plaintiff's release. On April 22, 1998, Mr. Morley sent a letter to Ms. Merchison urging that Mr. Amoroso was neither a danger to society nor a risk of flight and requesting

⁴ Plaintiff decided intentionally to violate the conditions of his supervised release to trigger an appearance before Judge Weiner at which time he hoped to withdraw his guilty plea, apparently in an effort to forestall or avert deportation. It is somewhat ironic that plaintiff is suing defendant over a period of detention which would not have occurred but for plaintiff's dubious decision to risk a period of incarceration by violating the terms of his supervised release.

his release on the prior bond pending the appeal. Ms. Merchison denied Mr. Morley's request.

Between February and June of 1998, plaintiff's sister unsuccessfully attempted to contact Mr. Morley on numerous occasions to discuss his situation. During this period, plaintiff retained a second attorney, Gary T. Jodha. On May 12, 1998, Mr. Jodha sent a letter to Ms. Merchison in Newark requesting that plaintiff be released on his own recognizance upon the posting of a reasonable bond. He enclosed a G-28 notice of appearance on behalf of Mr. Amoroso.

On May 29, 1998, Mr. Morley submitted a motion for a bond redetermination hearing to the Immigration Court in Philadelphia. The Executive Office of Immigration Review ("EOIR") replied by letter of June 13, 1998 that it did not have administrative control over the proceedings. On June 19, 1998, Mr. Morley filed a motion for a bond redetermination with the EOIR in Newark. The matter was scheduled before Judge Meisner at EOIR-Newark for June 26, 1998. The hearing was held as scheduled. Mr. Jodha appeared on behalf of plaintiff and obtained an order for release from custody upon the posting of a \$7,500 bond. Plaintiff was released from INS custody on June 28, 1998.

On August 5, 1998, Mr. Morley received notice from Mr. Jodha that he had been directed by plaintiff to secure his file.

Mr. Morley forwarded the file on August 11th and withdrew as counsel before the BIA. On December 6, 1999, the BIA denied Mr. Amoroso's appeal. Plaintiff failed to appear as directed by the INS and was placed in a fugitive status. He was ultimately located and taken into custody by the INS on May 4, 2001 at the office of defendant's attorney when he appeared for deposition in this case. Plaintiff was then deported to Italy.

IV. Discussion

Pennsylvania law recognizes legal malpractice claims under both tort and breach of contract theories. See Guy v. Liederbach, 459 A.2d 744, 748 (Pa. 1983); Fiorentino v. Rapoport, 693 A.2d 208, 212 (Pa. Super. 1997), appeal denied, 701 A.2d 577 (Pa. 1997). Plaintiff has pled the elements of a tort claim.

To sustain a tort claim for legal malpractice, a plaintiff must show his employment of the attorney or other basis for duty; the failure of the attorney to exercise ordinary skill and knowledge; and, damages as a proximate result of the attorney's failure to exercise such skill and knowledge. See id. Plaintiff asserts that defendant breached the duty to exercise ordinary skill and knowledge when he delayed in securing a bond redetermination, by not giving adequate attention to the case

while plaintiff was in INS custody and by failing adequately to communicate with plaintiff and his family.⁵

Defendant asserts that plaintiff's claim is barred by the applicable statute of limitations.⁶ Statutes of limitation are not "technicalities" but rather are "fundamental to a well-ordered judicial system." United States v. Richardson, 889 F.2d 37, 40 (3d Cir. 1989).

The Pennsylvania two-year statute of limitations governs claims for legal malpractice sounding in tort. See 42 Pa. C.S.A. § 5524(3); Robbins & Seventko Orthopedic Surgeons,

⁵ Plaintiff also alleged that defendant breached his professional duty "by never requesting a bond hearing" but the evidence is uncontroverted that Mr. Morley moved successfully for a bond redetermination hearing on June 19, 1998.

⁶ Defendant also contends that plaintiff, who has produced no expert testimony, has failed to establish a breach of the applicable standard of care; that plaintiff failed to establish any duty of defendant to represent plaintiff in pursuing a bond redetermination; and, that plaintiff has failed to establish any actual damages. Defendant correctly notes that the scope of representation formally undertaken in the agreement with plaintiff encompassed only the deportation hearing and appeal. Defendant also correctly notes that unless the lack of skill or knowledge displayed is so obvious as to be within the range of ordinary experience and comprehension of a layman, a malpractice plaintiff must produce expert testimony to establish the requisite professional standard and defendant's failure to comply with it. See Gans v. Mundy, 762 F.2d 338, 341 (3d Cir. 1985); Burns v. City of Philadelphia, 504 A.2d 1321, 1325 (Pa. Super. 1986). Defendant is also correct that plaintiff has presented no evidence at all to substantiate his claim for economic damages, although some degree of mental anguish may reasonably be inferred from an unwanted period of detention. Given the resolution of defendant's initial contention, however, it is unnecessary to elaborate upon or resolve the other contentions.

Inc. v. Geisenberger, 674 A.2d 244, 246 (Pa. Super. 1996). The occurrence rule, under which a cause of action accrues at the time the alleged harm is suffered, governs the accrual of a legal malpractice claim. See Fiorentino, 693 A.2d at 219.

The so-called "discovery rule" tolls the running of a statute of limitations until the plaintiff knows or reasonably should know that he has sustained an injury caused by another's conduct. See Bradley v. Ragheb, 633 A.2d 192, 194 (Pa. Super. 1993). The discovery rule is a "narrow exception." Tohan v. Owens-Corning Fiberglass Corp., 696 A.2d 1095, 1200 n.4 (Pa. 1997). It is applied in "only the most limited circumstances." Dalrymple v. Brown, 701 A.2d 164, 171 (Pa. 1997). The statute is tolled only if a person in the plaintiff's position exercising reasonable diligence would not have been aware of the salient facts. See Baily v. Lewis, 763 F. Supp. 802, 806 (E.D. Pa.), aff'd, 950 F.2d 721 (3d Cir. 1991).

"There are very few facts which cannot be discovered through the exercise of reasonable diligence." Vernau v. Vic's Market, Inc., 896 F.2d 43, 46 (3d Cir. 1990). See also Urland by and through Urland v. Merrell-Dow Pharms, Inc., 822 F.2d 1268, 1273 (3d Cir. 1987). Once plaintiff is aware of the salient facts, his failure to investigate or to exercise reasonable diligence in the investigation will not prevent the statute of limitations from running. See O'Brien v. Eli Lilly & Co., 668

F.2d 704, 710 (3d Cir. 1981). A plaintiff cannot evade a statute of limitations simply by stating that he only learned of events underlying his claim outside of the statutory period, or courts would never be able to dismiss claims which are clearly time barred. See LRL Properties v. Portage Metro Housing Authority, 55 F.3d 1097, 1107 n.5 (6th Cir. 1995).

Plaintiff contends that the limitations period should be tolled until August 11, 1998 when Mr. Jodha received plaintiff's file from Mr. Morley and learned he had not filed a proper motion for a bond redetermination until June 19, 1998. Plaintiff relies on Bailey v. Tucker, 621 A.2d 108 (Pa. 1993) to argue that the statute of limitations should be "tolled" until the termination of the attorney-client relationship.

Bailey v. Tucker did not involve tolling of a statute of limitations but rather the question of when a malpractice action by a criminal defendant against his former defense counsel accrues. The Court held that a claim for legal malpractice arising out of criminal representation accrues on the date the attorney-client relationship is terminated. Id. at 116. This holding, however, was expressly based upon the distinct nature of criminal cases. The Court stated that "criminal malpractice trespass actions are distinct from civil malpractice trespass actions and as a result the elements to sustain such a cause of action must likewise differ." Id. at 114. The Court went on to

hold that to prevail in a criminal malpractice action, a plaintiff must first obtain post-conviction relief dependent on attorney error. Id. at 115.⁷

Nothing in the Court's opinion or reasoning suggests that Bailey is applicable beyond the criminal context. Courts applying Pennsylvania law have not extended the Bailey rule to civil malpractice cases, but have applied the basic occurrence rule. See Forte v. O'Dwyer & Bernstein, 1994 WL 249790, *6 (E.D. Pa. June 9, 1994) (rejecting extension of Bailey to civil malpractice); Fiorentino, 693 A.2d at 219 (applying occurrence rule); Robbins & Seventko, 674 A.2d at 246 (same).

As to the failure of defendant to give adequate attention to plaintiff's case, he has presented nothing more than the failure to proceed with greater dispatch to attempt to secure his interim release pending disposition of the appeal to the BIA. With reasonable diligence, plaintiff could have learned that Mr. Morley had not moved for a bond redetermination hearing by mid-May of 1998 when he retained Mr. Jodha. Plaintiff could and reasonably may be expected to have asked Mr. Jodha in May 1998 immediately to inquire of defendant and the pertinent administrative personnel what, if any, motions for a bond redetermination had been filed and their status. Plaintiff

⁷ Proceedings related to deportation are "purely civil." INS v. Lopez-Mendoza, 468 U.S. 1032, 1038 (1984).

himself could have readily obtained such information upon simple inquiry at the time of his release on June 28, 1998. Yet, this action was initiated more than two years later.

Plaintiff was aware of defendant's failure more frequently to communicate at the time this was occurring. Indeed, it appears that it was plaintiff's dissatisfaction with his continued detention and his perception of defendant's unresponsiveness to his situation which prompted the engagement of Mr. Jodha. Moreover, there is no showing that more frequent conversations by defendant with plaintiff or his sister would have shortened the period of detention on which plaintiff's claim is predicated. Defendant learned from plaintiff's sister on April 1, 1998 that he had been taken into INS custody and promised at that time to seek his release. While plaintiff's detention may have been prolonged by defendant's lack of haste in acting upon such promise, there is no showing that it would have been shortened if defendant had more frequently communicated with plaintiff or his sister.

Plaintiff's claim is time barred. Accordingly, defendant's motion will be granted. An appropriate order will be entered.

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O R D E R

AND NOW, this day of March, 2002, upon
consideration of defendant's Motion for Summary Judgment (Doc.
#17) and plaintiff's response thereto, consistent with the
accompanying memorandum, **IT IS HEREBY ORDERED** that said Motion is
GRANTED and accordingly **JUDGMENT** is **ENTERED** in the above action
for the defendant.

BY THE COURT:

JAY C. WALDMAN, J.